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APR 29 1942

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1025.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN
OF THE WORLD LIFE INSURANCE SOCIETY and
STROMBERG-CARLSON TELEPHONE MANUFACTURING
COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

**MOTION FOR TEMPORARY RESTRAINING ORDER,
NOTICE OF MOTION AND AFFIDAVIT
IN SUPPORT OF MOTION.**

JOHN T. CAHILL,
*Solicitor for National Broadcasting
Company, Inc.*

DAVID M. WOOD,
*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,
*Solicitor for Stromberg-Carlson
Telephone Manufacturing Company.*

Supreme Court of the United States

OCTOBER TERM, 1941.

NATIONAL BROADCASTING COMPANY, INC., WOOD-
MEN OF THE WORLD LIFE INSURANCE SOCIETY
and STROMBERG-CARLSON TELEPHONE MANU-
FACTURING COMPANY,

Appellants,

vs.

No. 1025.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

Motion for Temporary Restraining Order.

Upon the annexed affidavit of Frank E. Mullen, sworn to April 28, 1942, and all the other papers filed herein and set forth in the transcript of record on this appeal, and all the proceedings heretofore had herein, the appellants move this Court for a temporary suspension of the order of the Federal Communications Commission, one of the appellees herein, in Docket No. 5060, made May 2, 1941, as amended October 11, 1941, the order involved on this appeal, until ten days after the filing in the District Court of the mandate upon this Court's decision on this appeal, in order that the *status quo* may be adequately preserved; and for such other and further relief as to this Court may seem just.

Dated, April 28, 1942.

JOHN T. CAHILL,
*Solicitor for National Broadcasting
Company, Inc.*

DAVID M. WOOD,
*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,
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No. 1025.

UNITED STATES OF AMERICA and the FEDERAL
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MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

Notice of Motion.

Sirs:

PLEASE TAKE NOTICE that the above motion will be submitted to the Court at the Courthouse of the Supreme Court of the United States, Washington, D. C., on the day on which the pending appeal herein is called for argument,

at 12 o'clock noon on that day or as soon thereafter as the motion can be submitted.

Dated, April 28, 1942

JOHN T. CAHILL,
*Solicitor for National Broadcasting
Company, Inc.*

DAVID M. WOOD,
*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,
*Solicitor for Stromberg-Carlson
Telephone Manufacturing Company.*

To:

CHARLES FAHY, Esq.,
Solicitor General,
Department of Justice,
Washington, D. C.

TELFORD TAYLOR, Esq.,
General Counsel,
Federal Communications Commission,
Washington, D. C.

LOUIS G. CALDWELL, Esq.,
Counsel for Mutual Broadcasting System, Inc.,
Washington, D. C.

Supreme Court of the United States

OCTOBER TERM, 1941.

NATIONAL BROADCASTING COMPANY, INC., WOOD-
MEN OF THE WORLD LIFE INSURANCE SOCIETY
and STROMBERG-CARLSON TELEPHONE MANU-
FACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

No. 1025.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
CITY, COUNTY AND STATE OF NEW YORK, }

FRANK E. MULLEN, being duly sworn, deposes and says:

I am Vice-President and General Manager of National Broadcasting Company, Inc., one of the appellants herein. I am making this affidavit in support of appellants' motion to enjoin and suspend the Order of the Federal Communications Commission of May 2, 1941 (as amended October 11, 1941) which is the subject matter of the appeal now pending before this Court.

Original Effective Date of Commission's Order.

The Order of the Commission here in question originally provided that:

" . . . these regulations shall become effective immediately: *Provided, That*, with respect to exist-

ing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties."

Postponements of Effective Date.

(1) On June 13, 1941 the original effective date of regulation 3.107 of the Order was changed by the Commission so that instead of becoming effective immediately (as provided in the original Order of May 2, 1941) such regulation became effective 90 days from May 2, 1941.

(2) On July 22, 1941, the effective date for the portions of the Order which were to have become effective on July 31, 1941 (that is, 90 days after the date of the original Order) was changed by an order of the Commission to September 16, 1941.

(3) On August 28, 1941 the effective date of the portions of the Order which were to have become effective on September 16, 1941 was again changed to an indeterminate date to be fixed by the Commission on and after September 12, 1941.

(4) On October 11, 1941 (after a rehearing on September 12) the Order, in so far as it had not already become effective on May 2, 1941, was made effective on November 15, 1941, except that regulation 3.107 was indefinitely suspended by the Commission, subject to being made effective on six months' notice.

(5) On October 31, 1941, after the commencement of this suit, the Commission partially suspended the effect of regulation 3.106.

The complaint in this action seeks an injunction suspending the Order only in so far as the Order purports to become effective on or before November 15, 1941.

Suspension of Commission's Order.

By stipulation of the parties and order of the District Court on November 12, 1941, the Commission suspended its Order until determination by the District Court of appellants' motion for preliminary injunction. At the same time it was informally agreed by letter between the appellants and the appellees that such suspension should be effective until ten days after service of an order of the District Court disposing of appellants' motion for a temporary injunction.

When the District Court dismissed the complaint on February 21, 1942, it held (R. 436) that there was jurisdiction in the Court of Appeals for the District of Columbia to review the Order under Section 402(b) of the Communications Act of 1934 in an appeal from a licensing proceeding (R. 436-438). When this determination was made by the District Court, counsel for appellants sought a stipulation from the Commission by which representative license renewal proceedings would be instituted to test the validity of the Order in that manner *provided the Commission would stay enforcement of the Order pending the determination of its validity in such licensing proceedings.* The Commission took the position that it would not suspend the Order pending the determination of cases arising under Section 402(b) of the Communications Act except as to an individual litigant.

When the Commission refused to suspend the Order pending proceedings under Section 402(b) of the Act except as to an individual litigant, appellants, within the ten-day period mentioned above, applied to the District Court for a stay of the Commission's Order pending the determination of this appeal. On March 2, 1942 the District Court entered an order restraining the Commission from enforcing its order *only* until May 1, 1942, or the argument of this appeal, whichever might be earlier. In granting this stay the District Court, in its *per curiam* opinion, stated:

"For any further stay the plaintiffs must apply to the Supreme Court itself or to the Circuit Justice."

In holding that appellants were entitled to a stay, the District Court, in its *per curiam* opinion, stated (R. 449-450):

"The Commission is of course right in saying that we have decided that the plaintiffs have adequate protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evidence before these actions were commenced that the proposed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiff's favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of May, 1942, whichever comes first."

The Findings of Fact and Conclusions of Law upon which the action of the District Court was based are as follows (R. 450):

"FINDINGS OF FACT."

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon; did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from enforcement, if the conditions mentioned in the First Finding exist.

CONCLUSION OF LAW.

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier."

Necessity for Further Stay.

These Findings of Fact and Conclusions of Law of the District Court are fully supported by the affidavits of Niles Trammell, verified October 30, 1941 (R. 225-253), and my affidavit verified January 3, 1942 (R. 405-419), in the court below and reference to those affidavits is respectfully made in lieu of a repetition of such facts in this affidavit. The irreparable injury to appellants if the regulations are not suspended pending the determination of this appeal and for a reasonable time thereafter is as great now as it was at the time the above mentioned affidavits were made.

It is important to note that the effective date of the Order with respect to existing contracts was postponed by the Commission's own action from May 2, 1941, the date of the original Order until November 15, 1941, and that from November 12, 1941 until the present time all parts of the Order have been continuously enjoined or suspended either by action of the Commission or by Court order. It is only because of such suspensions that appellants have been able to continue their operations as heretofore (except that they have been able to make new contracts only since November 12, 1941).

The stay of the District Court is only until May 1, 1942 or argument of the appeal, whichever shall first occur. After the allowance of the appeal, appellants requested the Commission and the United States to enter into a stipulation which would suspend the Order of the Commission until ten days after the determination of the appeal. This they refused to do but they did enter into a stipulation with appellants on April 25, 1942 extending the suspension of the Order until determination of the appeal or the last decision day of this term of the Supreme Court, whichever is earlier. The text of the stipulation is as follows:

"IT IS HEREBY STIPULATED by and between all the parties by their respective counsel that:

"Until the last decision day of the October, 1941 term of the Supreme Court of the United States or

until the determination of the pending appeal in the above entitled case by said Court, whichever is earlier, the defendant-appellee Federal Communications Commission is suspending, and will take no steps for enforcement or application of, the Commission's Order of May 2, 1941, in Docket No. 5060, as last amended October 11, 1941, with respect to any failure by any radio station to comply with such order."

The Commission refused, however, to stipulate for the suspension of the Order for any period of time after the determination of the appeal or after the last decision day of the present term. Consequently, the appellants have no protection from the enforcement of the Order for any period of time after the determination of the appeal (or for any time after the end of the present term if the appeal is not decided at this term) to permit them to obtain appropriate stay of enforcement pending further action in the court below, if the appeal is decided in favor of appellants, or in some other forum if the appeal is decided in favor of the appellees. Furthermore, appellants and the hundreds of radio stations which are affected by the Commission's Order are not given any period of time whatsoever after the determination of the appeal to adjust their affairs to meet the requirements of the Order and to minimize the injury which will result on the day the present stay expires.

If the decision of the District Court is reversed, the appellants will apply to the District Court for a determination of their pending motion for preliminary relief and will seek from the District Court a temporary stay pending the decision of the District Court on such motion. This will naturally take a few days and the purpose of the present motion is to obtain the necessary time to make such an application.

If the decision below is affirmed, it will be necessary for appellants to pursue such other remedy as may be available. If no other remedy can be obtained, it will be necessary for

the networks to modify existing contracts. In the case of National Broadcasting Company, Inc. this will involve approximately 76 stations; in the case of Columbia Broadcasting System, Inc., approximately 115 stations will be involved; and in the case of Blue Network Company, Inc., approximately 103 stations will be involved.

Ten days after filing of the mandate is the very minimum period of time which National Broadcasting Company, Inc. will need.

The pressing need of appellants for a stay until the filing in the District Court of the mandate upon this Court's decision on this appeal, and for a period of ten days thereafter, is to be contrasted with the lack of any showing by the appellees of any urgent public interest. The District Court pointed out in its Findings of Fact (R. 450):

"III. That the Commission, in the hearings leading to said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest."

WHEREFORE, appellants pray that this Court enter an order granting the relief set forth in the accompanying motion.

Frank E. Mullen

(FRANK E. MULLEN)

Subscribed and sworn to before me }
this 28th day of April, 1942.

Florence E. Marger

Notary Public.